Supreme Court, U.S.
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No. 99-1165

IN THE

Supreme Court of the United States

JERON J. LAFARGUE, SUSAN KYLE, *et al.*, on behalf of themselves and all others similarly situated,

Petitioners,

v.

THE UNITED STATES OF AMERICA and LOUISIANA INTRASTATE GAS COMPANY, L.L.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT LOUISIANA INTRASTATE GAS COMPANY, L.L.C.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court should decline to review a determination by the lower courts that the district court had subject matter jurisdiction of this case under 28 U.S.C. § 1346(f), and the Quiet Title Act, 28 U.S.C. § 2409(a), on the grounds that (a) the petitioners are judicially estopped from asserting a position directly contrary to that assumed by them before the United States Court of Appeal for the Fifth Circuit; (b) the decision by the Fifth Circuit does not meet the criteria set forth in Rule 10(a) of the Rules of the Supreme Court of the United States; and (c) the decision by the Fifth Circuit was correct;

2. Whether the Court should decline to review question 4 presented by petitioners, because there is in fact no conflict between the decisions of the district court and the United States Court of Appeal for the Fifth Circuit and the United States Supreme Court decision in *United States v. Winstar*, 518 U.S. 839, and/or the *Erie* Doctrine, 304 U.S. 64, and/or the Full Faith and Credit Clause of the U.S. Constitution, U.S. Const. art. IV, § 1, and on the further basis that no argument with regard to the *Erie* Doctrine or the Full Faith and Credit Clause was raised in, or passed upon by either of the lower courts.

3. Whether the Court should decline to review Questions 3 and 4 presented by petitioners, on the basis that those questions do not accurately describe the rulings of either the district court or the Court of Appeals for the Fifth Circuit, nor do these questions accurately describe the analysis employed by either court in reaching its

decision, and on the additional grounds that the lower courts properly applied federal common law to resolve the issues before them;

4. Whether the Court should decline to review a determination by the United States District Court for the Eastern District of Louisiana, affirmed by the United States Court of Appeals for the Fifth Circuit, that the pipeline and/or servitude granted by petitioners to the United States did not revert to petitioners.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Louisiana Intrastate Gas Company, L.L.C., is wholly owned by American Electric Power Company, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Statement Pursuant to Rule 29.6	iii
Table of Contents	iv
Table of Cited Authorities	vii
Statement of the Case	1
Course of Proceedings	2
Reasons for Denying the Writ	5
I. Subject Matter Jurisdiction Under 28 U.S.C. § 2409(a).	5
A. Petitioners are Judicially Estopped From Asserting a Position Before This Court Which Is Diametrically Opposed to the Position They Espoused Before the Lower Courts	6
B. The Lower Court Rulings In This Case On the Issue of Subject Matter Jurisdiction under 28 U.S.C. § 2409(a) Do Not Conflict With Any Decision Cited by Petitioners Which Construes That Statute	9

Contents

Page

C. *Delta Savings* and *Bank of Hemet* Squarely Support the Fifth Circuit Ruling on Subject Matter Jurisdiction under 28 U.S.C. § 2409(a) 12

II. The Lower Court Rulings in This Case Do Not Conflict With the United States Supreme Court Decision in *United States v. Winstar*, the *Erie* Doctrine, or the Full Faith and Credit Clause of the United States Constitution ... 13

A. Petitioners Failed to Raise Any Argument Relating to the *Erie* Doctrine or the Full Faith and Credit Clause Before the Fifth Circuit and This Court Should Thus Refuse to Consider Those Arguments 14

B. The Present Case Does Not Conflict With *Winstar*, *Erie* or the Full Faith and Credit Clause 14

III. The Lower Courts Properly Applied Federal Common Law To Interpret the Richard Servitude and Determine That Ownership of the Pipeline and Servitude Did Not Revert to Petitioners 16

A. Need for Express Provision for Termination or Revocation of Servitude 17

Contents

Page

B. Statement of Public Use Not a Resolutory Condition of the Servitude 19

C. Servitude Was Not Terminated Because Its Use Became "Impossible" 22

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Bank of Hemet v. United States, 643 F.2d 661 (9th Cir. 1981) 7, 8, 12, 23

Bank One Texas v. United States, 157 F.3d 397 (5th Cir. 1998), *certiorari denied*, 119 S. Ct. 1761, 143 L. Ed. 2d 792 (1999) 16, 17

Bily v. Illinois Central Gulf R. Co., 637 F. Supp. 127 (N.D. Ill. 1986) 11

Block v. North Dakota ex rel. Bd. of University and School Lands, 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (U.S. 1983) 12

Delta Savings and Loan v. IRS, 847 F.2d 248 (5th Cir. 1988) 8, 12, 23

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) .... i, 13, 14, 16, 23

Franco v. Selective Insurance Company, 184 F.3d 4 (1st Cir. 1999) 8

Gardner v. Stager, 103 F.3d 886 (9th Cir. 1996) ... 12

In re Chambers Development Co., Inc., 148 F.3d 214 (3rd Cir. 1998) 8

Cited Authorities

	Page
In re Coastal Plains, Inc., 179 F.3d 197 (5th Cir. 1999)	8
Keeley v. Schexnaider, 97-1609 (La. App. 3d Cir. 4/1/98), 708 So.2d 838	19
King v. Herbert J. Thomas Memorial Hosp., 159 F.3d 192 (4th Cir. 1998)	8
Lafargue v. United States, 4 F. Supp. 2d 593 (E.D. La. 1998)	21
Lee v. United States, 629 F. Supp. 721 (D. Alaska 1985), *affirmed*, 809 F.2d 1406 (9th Cir. 1987), *certiorari denied*, 484 U.S. 1041, 108 S. Ct. 772, 98 L. Ed. 2d 859 (1988)	9, 10
Lesnoi, Inc. v. United States, 170 F.3d 188 (9th Cir. 1999)	10
Madan v. U.S. by and through I.R.S., 850 F. Supp. 148 (N.D.N.Y. 1994)	10
Mitchell v. Washingtonville Cent. School Dist., 190 F.3d 1 (2nd Cir. 1999)	8
Ogden v. Bankston, 398 So.2d 1037 (La. 1981)	19
Orleans Parish School Board v. Campbell, 132 So.2d 885 (1961)	18

Cited Authorities

Page

Orleans Parish School Board v. Campbell, 241 La. 1029, 132 So.2d 885 (1961) 18

Red River v. Noles, 406 So.2d 294 (La. App. 3d Cir. 1981) 19

Ryan v. Southern Natural Gas Co., 879 F.2d 162 (5th Cir. 1989) 19

Simmons v. Board of Commissioners of the Bossier Levee District, 624 So.2d 935 (La. App. 2d Cir. 1993) 18

United States v. Beggerly, 524 U.S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998) 12

United States v. Williams, 504 U.S. 36, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992) 14

United States v. Winstar Corp., 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996) ..i, 13, 14, 15, 23

W.H. Pugh Coal Co. v. United States, 418 F. Supp. 538 (E.D. Wis. 1976) 11

Winstar Corporation v. United States, 64 F.3d 1531 (Fed. Cir. 1995) 15

Winstar Corporation v. United States, 25 Cl. Ct. 541 (1992) 15, 16

Cited Authorities

Page

Statutes:

La. R.S. 38:113 18

Louisiana Civil Code Article 697 19

Louisiana Civil Code Article 749 19

28 U.S.C. § 1346(f) ..... i, 3, 5, 6, 16

28 U.S.C. § 1367 3

28 U.S.C. § 2409 12

28 U.S.C. § 2409(a) ..... i, 3, 5, 6, 9, 10, 12, 13

28 U.S.C. § 2409(a)(e) 5, 6, 13, 23

28 U.S.C. § 2410 12

42 U.S.C. § 6201, *et seq.* 1

42 U.S.C. § 6233 21

42 U.S.C. § 6239(f)(1)(B) 1

42 U.S.C. § 6239(f)(1)(D) 1

43 U.S.C. §§ 1601-1641 9

Cited Authorities

Page

United States Constitution:

U.S. Const. art. IV, § 1 ..... i, 13

Rules:

Fed. R. Civ. P. 12(b)(6) 4

United States Supreme Court Rule 10 ..... 16, 23

United States Supreme Court Rule 10(a) ..... i, 13

Other Authority:

Yiannopoulos, *Extinction of Predial Servitudes*, 56 Tul L. Rev. 1285 (1982) 22

STATEMENT OF THE CASE

This case revolves around the ownership of a pipeline and the underlying servitudes located in the Louisiana parishes of Iberia, St. Mary, St. Martin, St. James, and Assumption. The servitudes were acquired and the pipeline was constructed by the Government as part of its Strategic Petroleum Reserve Plan ("SPRP"). The SPRP was established under the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6201, *et seq.* and was intended to serve as a reserve to reduce the impact of energy supply interruptions or reductions in imports of crude oil and refined petroleum products. Under the EPCA, to the extent necessary or appropriate to implement the SPRP, the Government is authorized to "acquire by purchase, condemnation or otherwise, land or interests in land for the location of storage and related facilities". 42 U.S.C. § 6239(f)(1)(B). The Government may also "construct, purchase, lease or otherwise acquire storage and related facilities," and "use, lease, maintain, sell, or otherwise dispose of storage and related facilities acquired pursuant to this part." 42 U.S.C. § 6239(f)(1)(B). Further, the Government is authorized to "execute any contracts necessary to carry out the provisions" of the SPRP. 42 U.S.C. § 6239(f)(1)(D).

In furtherance of the SPRP, the Government sought to construct a 36-inch diameter pipeline to extend approximately 67 miles from the St. James terminal to the Weeks Island Storage Facility in Iberville Parish, which were both owned in fee by the Government. In order to lay the pipeline, and pursuant to statutory authority, the Government secured rights-of-way from landowners by means of direct purchase, condemnation and/or donation. The named plaintiffs in this proposed class action are parties to a certain

Donation of Servitude and Easement dated August 10, 1979 (hereinafter the "Richard Servitude").

The construction of the pipeline was completed in 1979 and it was in continuous service as part of the SPRP from October, 1980 to March 1997. During this time, the pipeline was used to transport crude oil between the St. James terminal and the Weeks Island Storage Facility. In recent years, due in part to a geotechnical problem at the Weeks Island Storage Facility, the Government removed the oil from that location and, in March 1997, decommissioned the pipeline. The Government no longer uses the pipeline to transport oil between the two locations.

After the decision to decommission the pipeline was made, the Government solicited bids from interested parties for the sale of the pipeline and the perpetual easements. After this suit was filed, the Government sold and conveyed to Louisiana Intrastate Gas Co., L.L.C. ("LIG"), "as is" and "where is," under Quit Claim Deed executed August 22, 1997, all right, title and interest the Government had in the pipeline and the perpetual easements for a total sum of $22 million. LIG has integrated the pipeline into its existing pipeline system which is used for the transportation of natural gas.

COURSE OF PROCEEDINGS

On July 31, 1997, the named plaintiffs-appellants, fifteen individuals who owned an approximately 50% undivided interest in approximately 4.5 acres of land located in St. Mary Parish, Louisiana, which property is burdened by the Richard Servitude, filed suit against the United States Government and LIG in the United States District Court for the Eastern

District of Louisiana, asserting subject matter jurisdiction under 28 U.S.C. § 1346(f), 28 U.S.C. § 2409(a) and 28 U.S.C. § 1367.

On October 24, 1997, plaintiffs filed a "First Amended Complaint - Class Action" on behalf of themselves and others similarly situated. Plaintiffs' class action stated (6) counts, seeking:

I. A judicial declaration that the right-of-way they or their ancestors in title granted to the United States by the August 10, 1979 donation (*i.e.*, the Richard Servitude) had expired or terminated, and that they owned that portion of the pipeline for which the right-of-way was granted and which traverses their property.

II. Alternatively, a judgment requiring the United States to remove the pipeline.

III. An injunction limiting the purposes for which the United States and/or LIG could use the pipeline.

IV. Damages from the United States in the amount of $22 million.

V. Money damages from the U.S. States and/or LIG *in solido,* in the amount of $22 million.

VI. Recision for lesion beyond moiety of those right-of-way servitudes granted in the LIG Agreement by two of the plaintiff-appellants and others similarly situated.

After answering the lawsuit, the United States and LIG moved to dismiss, arguing the district court lacked subject matter jurisdiction because the Government disclaimed any interest in the property.

On April 8, 1998, the district court denied the motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(6). The district court first concluded that plaintiffs' claims fell under the Quiet Title Act ("QTA") and not the Tucker Act. The district court therefore dismissed Counts II and III because the relief sought was not available under the QTA. The district court also dismissed Count VI of the complaint, the lesion claim, and LIG's counterclaim for expropriation for lack of subject matter jurisdiction. On April 24, 1998, upon the Government's motion for partial reconsideration of the district court's ruling of April 8, 1998, the district court dismissed Counts IV and V as also seeking relief not available under the QTA.

On May 27, 1998, the district court granted summary judgment to the United States and LIG. The court concluded that the Richard Servitude did not restrict the use of the rights-of-way solely to the SPRP and that the rights-of-way could be used for other purposes without being extinguished. The court held that the Government has maintained ownership of the servitudes and the pipeline continuously since 1979, and dismissed plaintiffs' lawsuit.

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's dismissal of the lawsuit.

REASONS FOR DENYING THE WRIT

I. Subject Matter Jurisdiction Under 28 U.S.C. § 2409(a).

The District Court held that petitioners were proceeding exclusively under the Quiet Title Act, 28 U.S.C. § 2409(a), and its jurisdictional counterpart, 28 U.S.C. § 1346(f) — the precise jurisdictional basis asserted by petitioners in their original petition. On January 30, 1998, as an attachment to its motion to dismiss, the Government, filed an affidavit by Patricia Segur which, it claimed, constituted a disclaimer under 28 U.S.C. § 2409(a)(e), thus requiring dismissal for lack of subject matter jurisdiction. Notwithstanding the filing of this disclaimer, the district court found it probable that the Government had not acted in good faith in filing the disclaimer, and refused to confirm the disclaimer under 28 U.S.C. § 2409(a)(e), and held that it retained subject matter jurisdiction to decide the case.

The Fifth Circuit affirmed the district court's ruling, although it did not find that the Government acted in bad faith.

Petitioners now reverse their stance in both the district court and the Fifth Circuit, urging this Court to grant their writ application and vacate the lower court rulings for lack of subject matter jurisdiction.

A. Petitioners are Judicially Estopped From Asserting a Position Before This Court Which Is Diametrically Opposed to the Position They Espoused Before the Lower Courts

The petitioners chose to file their lawsuit in the United States District Court for the Eastern District of Louisiana, asserting subject matter jurisdiction under 28 U.S.C. § 2409(a) and its jurisdictional counterpart, 28 U.S.C. § 1346(f). At both the district court and appellate court levels, Petitioners vigorously opposed the Government's argument that it had disclaimed any interest in the subject pipeline and servitude, and that the district court no longer had subject matter jurisdiction. Now petitioners completely reverse their position, proclaiming with equal vigor that the district court had no discretion to confirm or deny confirmation to the Government's disclaimer, and that under 28 U.S.C. § 2409(a)(e), subject matter jurisdiction was lost upon the filing of that disclaimer.

This Court should not expend judicial time and resources in reviewing a position that the petitioners themselves don or cast aside as circumstances warrant. The time-honored doctrine of judicial estoppel affords the Court an additional basis on which to decline petitioners' writ application.

As an example of the astonishing reversal in petitioners' argument, they stated in their reply brief before the Fifth Circuit:

> The government concedes that the district court had jurisdiction initially, but argues that the declaration of Patricia Segur of January 29, 1998

> was a "disclaimer" under 28 U.S.C. § 2409(a)(e), based on the sale of the disputed property to LIG on August 22, 1997, which divested the district court of jurisdiction. However, as the district court found, this was no disclaimer [citation omitted]. And, even if the declaration does constitute a disclaimer under the QTA, it was ineffective to divest the district court of jurisdiction because it was made after the filing and service of the complaint, and perhaps more importantly, after it exercised its ownership interest in the property by selling it to LIG [citations omitted].[1]

Now petitioners would have this Court ignore the prior argument and adopt the following argument:

> Section 2409(a)(e) expressly provides that federal jurisdiction under the QTA ceases when the United States disclaims its interest in property, and the disclaimer "is confirmed by order of the court." 28 U.S.C.A. § 2409(a)(e). The district court's role in this context is to formalize, by court order, the disclaimer filed by the United States so that the disclaimer may be relied upon by others. The statute provides the district court with no discretion to reject a valid disclaimer on any grounds [citation omitted].[2]

The Fifth Circuit cited two cases in support of its ruling on subject matter jurisdiction, *Bank of Hemet v. United*

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1. Reply Brief of Appellants to the United States Court of Appeals for the Fifth Circuit, page 5.

2. Petition for Writ of Certiorari, page 14.

States, 643 F.2d 661 (9th Cir. 1981), *Delta Savings and Loan v. IRS*, 847 F.2d 248 (5th Cir. 1988). In their reply brief to the Fifth Circuit, petitioners call these cases ". . . are fully applicable here because, similar to this case, the government was arguing for dismissal because it had no interest in the property at issue."[3] Now petitioners style these same cases "clearly distinguishable."[4]

Every federal appellate circuit recognizes the doctrine of judicial estoppel. Judicial estoppel is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding. It is not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from playing fast and loose with the courts. *See In re Chambers Development Co., Inc.*, 148 F.3d 214 (3rd Cir. 1998); *Franco v. Selective Insurance Company*, 184 F.3d 4 (1st Cir. 1999); *King v. Herbert J. Thomas Memorial Hosp.*, 159 F.3d 192 (4th Cir. 1998). Some circuits hold that the position must be a "factual" one, and that the party urging the application of the doctrine must show (1) the party against whom the estoppel is asserted to an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some manner. *See, e.g., Mitchell v. Washingtonville Cent. School Dist.*, 190 F.3d 1 (2nd Cir. 1999); *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999). Other circuits do not require the showing of a benefit to the inconsistent party. *See, e.g., Chambers, supra.*; *Coastal Plains, supra.*

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3. Reply Brief of Appellants to United States Court of Appeals for the Fifth Circuit, page 11.

4. Petition for Writ of Certiorari, page 14.

While this Court has not to date formally adopted judicial estoppel as a basis for denial of a writ application, consideration of the doctrine in this case certainly belies any characterization of this case as so compelling as to merit review.

B. The Lower Court Rulings In This Case On the Issue of Subject Matter Jurisdiction under 28 U.S.C. § 2409(a) Do Not Conflict With Any Decision Cited by Petitioners Which Construes That Statute

Plaintiffs argue that the ruling of the lower courts on this issue, "is not only contrary to the express language of the QTA but is contrary to *every* case construing section 2409(a)(e)."[5] Closer examination of the cases they cite to demonstrate this ostensible waywardness — only one of which is an opinion by a Court of Appeals — are either completely distinguishable and have no bearing on this issue, or support the lower court rulings.

In *Lee v. United States*, 629 F. Supp. 721 (D. Alaska 1985), *affirmed*, 809 F.2d 1406 (9th Cir. 1987), *certiorari denied*, 484 U.S. 1041, 108 S. Ct. 772, 98 L. Ed. 2d 859 (1988), the Government was compelled by the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1641, to convey land it owned to a native village corporation, and a lawsuit was filed by disgruntled claimants to the same land. Although the district court found that it had no subject matter jurisdiction due to the filing of a disclaimer by the Government, it noted:

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5. Petition for Writ of Certiorari, Page 8.

> Since the United States' conveyance of the disputed homestead property was required under the terms of the ANCSA, there is no question that its disclaimer is valid and was made in good faith.

Lee, supra, at 726.

Thus, the Alaska district court implied that it could decline to confirm a "bad faith" disclaimer by the United States and thus retain subject matter jurisdiction of the case.

In *Lesnoi, Inc. v. United States*, 170 F.3d 188 (9th Cir. 1999), plaintiff sued the United States to quiet title to land previously conveyed to it by the Government. After the lawsuit was filed, the Government filed a disclaimer of interest and the Court of Appeals confirmed the district court's ruling that it did not even have subject matter jurisdiction to confirm the disclaimer. The case is distinguishable because it does not actually involve the issue of a disclaimer at all; the court held that it lacked subject matter jurisdiction *ab initio* because the Government no longer owned the property at the time the suit was filed and there was thus no "disputed title" entitling the plaintiff to bring the action under 28 U.S.C. § 2409(a).

Madan v. U.S. by and through I.R.S, 850 F. Supp. 148 (N.D.N.Y. 1994) involved an attempted exercise of a right of redemption by the Internal Revenue Service against the transferee of property purchased at a foreclosure sale, and a subsequent lawsuit by that transferee and his seller, the bank which purchased the property at the foreclosure, disputing the exercise of that right and the sale by the I.R.S. For reasons not explained in the decision, the Government filed a disclaimer of interest in the property after the lawsuit had

commenced, thus certifying that it had no further interest in the property. While the district court did note that its confirmation of the disclaimer was a "formality" — language seized upon by the petitioners in the case before this Court as exemplifying their proffered rule that the district court *must* confirm such a disclaimer — the context of the case was, again, resolution of a two-way dispute between the United States and the plaintiffs, with the United States simply confirming that the case was moot. There was no non-plaintiff transferee of the property, no controversy as to ownership, and the case offers no guidance to the lower courts in the present case.

W.H. Pugh Coal Co. v. United States, 418 F. Supp. 538 (E.D. Wis. 1976), did involve the transfer, after suit was filed, of property by the United States to a non-plaintiff — in this instance, the state of Wisconsin — and the subsequent filing and confirming of a disclaimer, but the district court noted:

> If this were a situation in which the state and federal authorities were attempting to whipsaw the plaintiff and to harass it so as to avoid a resolution of this dispute, I would be reluctant to grant the dismissal.

Pugh, *supra*, at 539. This is hardly a ringing endorsement of petitioners' position that the trial court must confirm a disclaimer, and has no discretion to base its decision to confirm such a disclaimer on the particular facts and circumstances of the case.

In *Bily v. Illinois Central Gulf R. Co.*, 637 F. Supp. 127 (N.D. Ill. 1986), the United States, one of many defendants, concluded after suit was commenced that it did not and never

had any valid claim to the property in question, and filed a disclaimer which resulted in its dismissal. This case stands in stark factual contrast to the present case, where the United States clearly had and claimed an interest in the property at issue when the lawsuit was filed, and transferred that claim for consideration to a party other than the plaintiff.

Neither *Block v. North Dakota ex rel. Bd. of University and School Lands*, 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (U.S. 1983), *United States v. Beggerly*, 524 U.S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998), nor *Gardner v. Stager*, 103 F.3d 886 (9th Cir. 1996), involved disclaimers, and *Gardner* was not even a lawsuit filed under the Quiet Title Act. These cases are of no help to petitioners and certainly pose no "conflict" to the Fifth Circuit's ruling.

C. *Delta Savings* and *Bank of Hemet* Squarely Support the Fifth Circuit Ruling on Subject Matter Jurisdiction under 28 U.S.C. § 2409(a)

Petitioners argue that the cases relied upon by the Fifth Circuit in this case, *Delta Savings and Loan Association, Inc. v. I.R.S.*, 847 F.2d 248 (5th Cir. 1988), and *Bank of Hemet*, 643 F.2d 661 (9th Cir. 1981), are distinguishable because they involved United States lien interests and not property interests,[6] and in neither case did the United States file a formal disclaimer with the court. Not only is this is a startling reversal of the petitioners' stance before the Fifth Circuit (see Section I above), the courts in *Delta Savings* and *Bank of Hemet* both expressly based their decisions on 28 U.S.C. § 2409(a), found that subject matter jurisdiction should be determined under that statute at the time suit was filed, and

6. And thus, argue petitioners, are subject to 28 U.S.C. § 2410 instead of 28 U.S.C. § 2409.

also found that a sale of the property by the United States was itself a sufficient "disclaimer" to raise the issue under 28 U.S.C.§ 2409(a)(e). Thus, the Ninth and Fifth Circuits — the only courts at the appellate level to rule on the issue — are in harmony, not conflict, as to when jurisdiction under 28 U.S.C. § 2409(a) should be determined.

Petitioners' claim that the ruling of the Fifth Circuit is in conflict with "*every* case construing Section 2409(a)(e),"[7] is simply wrong. The Fifth Circuit decision in this case is not in conflict with any decision of another United States court of appeals on the same matter, nor did it depart "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10(a), Rules of the Supreme Court of the United States. Thus, there is simply no reason for this Court to grant the writ application.

II. The Lower Court Rulings in This Case Do Not Conflict With the United States Supreme Court Decision in *United States v. Winstar*, the *Erie* Doctrine, or the Full Faith and Credit Clause of the United States Constitution

Petitioners argue that the use of federal common law by the lower courts to interpret the Richard Servitude somehow runs afoul of *United States v. Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996), *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), and the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1.

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7. Petition for Writ of Certiorari, page 8.

A. Petitioners Failed to Raise Any Argument Relating to the *Erie* Doctrine or the Full Faith and Credit Clause Before the Fifth Circuit and This Court Should Thus Refuse to Consider Those Arguments

While Petitioners did discuss a violation of the *Winstar* decision in their original appellate brief before the Fifth Circuit, they did not mention any violation of the *Erie* Doctrine or the Full Faith and Credit Clause in that forum, nor did the court consider or pass upon these arguments. Thus this Court should not consider them, in accordance with the traditional rule which precludes a grant of certiorari when the question presented was not pressed or passed upon by the lower courts. *United States v. Williams*, 504 U.S. 36, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992).

B. The Present Case Does Not Conflict With *Winstar*, *Erie* or the Full Faith and Credit Clause

According to petitioners, this Court held in *United States v. Winstar*, *supra*, that "the United States is to be treated as any other private party in contractual dealings, and therefore its interests in contracts which it enters into are subject to state law just as any private party's interests are."[8] This is not what *Winstar* held.

United States v. Winstar, *supra*, concerned complaints by various savings and loan associations that the Government had reneged on promises to accord them certain favorable accounting practices if they purchased other, ailing savings & loan associations. Far from holding that the United States

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8. Petition for Writ of Certiorari, page 16.

was "to be treated as any other private party" when considering its rights and obligations under a contract, the Court examined the circumstances under which the United States could assert special defenses essentially stemming from the dual role of sovereign and contractual party. While the Court found the defenses inapplicable in the factual context of that case, it clearly found the defenses alive and well under other circumstances.[9] Thus it is clear the case does not stand for the untenable and insupportable proposition that the United States Government, although acting pursuant to federal statutory authority, is bound to act in accordance with the law of each and every state in which it operates under that authority. The United States, in fact, is not and can never under all circumstances be like "any other private party."

Winstar had nothing to do with the application of federal common law or any conflict between state law and federal common law. The issue of whether or not contracts existed and whether they had been breached had already been determined by the lower courts, *See Winstar Corporation v. United States*, 64 F.3d 1531 (Fed. Cir. 1995); *Winstar Corporation v. United States*, 21 Cl. Ct. 112 (1990); and *Winstar Corporation v. United States*, 25 Cl. Ct. 541 (1992), just as in our case the issue of the rights and obligations

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9. For example, with regard to the defense of "unmistakability", the Court stated:

> The application of the doctrine will therefore differ according to the different kinds of obligations the Government may assume and the consequences of enforcing them.

Winstar, *supra*, at 2457.

flowing from the Richard Servitude have already been determined. *Winstar* has no applicability to this case.

Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), concerns the law to be applied by a federal court sitting in diversity. This also has nothing to do with this case, in which jurisdiction is founded upon the Quiet Title Act and 28 U.S.C. § 1346(f).

Petitioners make no specific argument with regard to the Full Faith and Credit Clause, and respondents will not speculate on what such an argument might be.

To the extent, therefore, that petitioners are attempting to demonstrate that the Fifth Circuit decided an "important federal question in a way that conflicts with relevant decisions of this Court,"[10] they have utterly failed to do so.

III. The Lower Courts Properly Applied Federal Common Law To Interpret the Richard Servitude and Determine That Ownership of the Pipeline and Servitude Did Not Revert to Petitioners

The Fifth Circuit applied federal common law to the present dispute, relying upon its decision in *Bank One Texas v. United States*, 157 F.3d 397 (5th Cir. 1998), *certiorari denied*, 119 S. Ct. 1761, 143 L. Ed. 2d 792 (1999). In applying federal common law, the court is to "look to state law as an aid in determining the application of statutory language to specific facts," although "such state law should be compatible with the purpose of the legislation so as to find the rule that will be effectuate federal policy." *Bank*

10. Rule 10, Rules of the Supreme Court of the United States.

One Texas, *supra*, at 403. This resort to state law "may provide courts with insight about 'ownership, transfer and title to real estate," *Bank One Texas*, *supra*, at 403, and "may also assist in discerning knowledge of the Government's claim." *Ibid.*

Shorn of its Constitutional trappings (see Section II above), petitioners' argument is simply that the lower courts did not glean the correct Louisiana law to guide them in determining the federal common law — hardly an issue that merits the granting of a writ of certiorari by this Court. Furthermore, the district court and the Fifth Circuit had ample grounds to rule precisely as they did.

A. Need for Express Provision for Termination or Revocation of Servitude

Petitioners argue that the Fifth Circuit erroneously concluded that the Richard Servitude had to contain "an express provision for termination or revocation if it was to terminate and revert back to the donors upon a change in use of the pipeline from the establishment of the SPRP to the commercial transportation of gas by LIG."[11]

The Fifth Circuit found after review of *all* of the provisions of the Richard Servitude that the parties thereto did not intend the servitude to terminate if the United States ceased using the pipeline to serve the Strategic Petroleum Reserve Program. This conclusion was based not only upon the absence of any express language in the Richard Servitude to that effect, but also upon the presence of language in the Richard Servitude detailing *other* grounds for termination,

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11. Petition for Writ of Certiorari, page 19.

and language making the servitude "perpetual" and "assignable." Thus, it is clear that the Fifth Circuit, applying federal common law, properly relied upon "general principles of contract and property law, recognized in Louisiana and elsewhere," for guidance in reaching its decision.

Plaintiffs rely upon *Simmons v. Board of Commissioners of the Bossier Levee District*, 624 So.2d 935 (La. App. 2d Cir. 1993) to demonstrate the scope of a "stated purpose" in a servitude. The *Simmons* case, however, does not involve the interpretation of a conventional servitude such as the Richard Servitude, and the attendant determination of the parties' intent. Instead, the Court in *Simmons* was required to interpret the extent of a servitude established by law, *viz.*, La. R.S. 38:113. Thus that case does not assist in the resolution of the case before this Court.

Petitioners also rely upon *Orleans Parish School Board v. Campbell*, 132 So.2d 885 (1961) to support their argument that under Louisiana law no express language is required to preserve a reversionary interest in favor of the grantor of a servitude.

The language interpreted by the court in *Orleans Parish School Board v. Campbell*, 241 La. 1029, 132 So.2d 885 (1961); however, also made it clear that the donor *intended* the purpose of the donation to serve as a resolutory condition, while the Fifth Circuit in the case before this Court expressly found that the parties did *not* intend the purpose stated in the Richard Servitude to serve as a resolutory condition. Most importantly, the language of the donation in *Campbell* did not provide that the rights given by the donor were assignable.

B. Statement of Public Use Not a Resolutory Condition of the Servitude

Petitioners argue that the Fifth Circuit should have looked to the statement of public purpose for which the servitude was acquired in order to determine its permissible scope and use. For this proposition, plaintiffs cite Louisiana Civil Code Article 749. That article states specifically as follows:

> *If the title is silent as to the extent and manner of use of the servitude*, the intention of the parties is to be determined in the light of its purpose.

Louisiana jurisprudence has made it clear that when a servitude is established by the owner of property, the use and extent of that servitude are regulated by the title by which it is created. La. Civ. Code art. 697; *Ogden v. Bankston*, 398 So.2d 1037 (La. 1981); *Ryan v. Southern Natural Gas Co.*, 879 F.2d 162 (5th Cir. 1989). The Civil Code permits the Court to determine the extent and use of a servitude based on its purpose only when the title is silent. *Keeley v. Schexnaider*, 97-1609 (La. App. 3d Cir. 4/1/98), 708 So.2d 838; *Red River v. Noles*, 406 So.2d 294 (La. App. 3d Cir. 1981).

The Richard Servitude states clearly both its extent and allowable use. The extent of the servitude is set forth in the exhibits to the Richard Servitude, which clearly delineate the property which is to be covered by the servitude. Likewise, the language of the Richard Servitude clearly states that it is to be used for "the location, construction, operation, maintenance, alteration, repair and patrol of a single pipeline. . . ." Therefore, there is no reason to resort to an

examination of the statement of public purpose for which the servitude was acquired in order to determine the permissible extent or use of the servitude.

Plaintiffs' argument that the language in the Richard Servitude regarding the Strategic Petroleum Reserve should be construed as a resolutory condition ignores the remaining language which clearly states that the Richard Servitude is perpetual and assignable. The specific language of the agreement states as follows:

> The above named parties declare that we, by this act, do donate, convey, transfer, set over and deliver . . . unto the UNITED STATES OF AMERICA and its *assigns*, including its officers, agents, servants, and contractors, a *perpetual* and *assignable* easement and right-of-way. . . .

The language of the document later reiterates the party's intent that the servitude be perpetual and assignable as follows:

> TO HAVE AND TO HOLD the complete *perpetual* rights, powers, privileges of the easement and/or servitude hereby conveyed unto the UNITED STATES OF AMERICA and its *assigns*. . . .

The language which the plaintiffs rely on to create their "resolutory condition" states:

> . . . we, by this act, do donate, . . . unto the United States of America. . . a perpetual and assignable easement and right-of-way in, on, over and across

> the land for the location, construction, operation, maintenance, alteration, repair and patrol of a single pipeline in the *establishment, management, and maintenance of the Strategic Petroleum Reserve*. . . .
>
> * * *
>
> This donation is made and accepted for and in consideration of grantors desire to aid their country in the *establishment of a Strategic Petroleum Reserve* and in further consideration of grantee's agreement to construct and operate said pipeline in accordance with the following specific requirements. . . .

The Secretary of the Department of Energy is the only person who is statutorily granted authority over "the establishment, management and maintenance" of the Strategic Petroleum Reserve, 42 U.S.C. § 6233, as the district court properly pointed this out in dismissing plaintiffs' claims. *Lafargue v. United States*, 4 F. Supp. 2d 593, 604 (E.D. La. 1998). Therefore, if the language regarding the Strategic Petroleum Reserve is interpreted as a resolutory condition, the language specifically allowing assignment of the servitude would be rendered meaningless.

The Fifth Circuit's interpretation of the language regarding acquisition of the servitude for the Strategic Petroleum Reserve gives meaning to all provisions of the contract. In the course of preparing to construct this pipeline, the Government was simply attempting to make it clear that the Richard Servitude and others like it were being acquired for a public purpose. The language quoted above reflects

clearly that the parties intended to allow transfer of this servitude by the Government.

C. Servitude Was Not Terminated Because Its Use Became "Impossible"

Finally, petitioners argue that the pipeline servitude was terminated when its use became "impossible."[12] Petitioners argue that because the Government no longer uses the pipeline to transport crude oil, use of the servitude has become impossible. They further argue that this should be regarded as grounds for termination of the servitude.

Plaintiffs cite no statutory or jurisprudential authority for their argument. Furthermore, the argument fails if transfer of the pipeline and servitude to a third party is permitted by the servitude contract — which, as previously demonstrated, is true in this case. Thus, while the initial use of the pipeline may no longer be practicable, its present use by a third party falls within the scope of the contract and the intent of the parties, and use of the servitude thus clearly continues to be "possible."

The only support which plaintiffs cite for their argument is a law review article on predial servitudes. Yiannopoulos, *Extinction of Predial Servitudes*, 56 Tul L. Rev. 1285 (1982), which they refer to in their brief.[13] The language quoted, however, makes clear that Professor Yiannopoulos' theory is based on the principle that a predial servitude must confer a benefit on the dominant estate. In the case of a *right of*

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12. Petition for Writ of Certiorari, page 28.

13. Petition for Writ of Certiorari, page 28.

use, such as the Richard Servitude, there is no dominant estate.

CONCLUSION

The Fifth Circuit holding on the issue of subject matter jurisdiction under 28 U.S.C. § 2409(a)(e) is in harmony with the Ninth Circuit, the only other Court of Appeals which has ruled on that question. *See*, *Delta Savings & Loan*, *supra*, and *Bank of Hemet*, *supra*. Although some of the district court opinions cited by petitioners may differ from the Fifth Circuit in certain particulars, they all allow the trial court discretion to decline to accept a disclaimer if circumstances warrant. Accordingly, these decisions are closer to that issued by the Fifth Circuit in this case than they are to the position espoused by petitioners, to wit, that the trial court *must* confirm a disclaimer, whenever filed and regardless of the circumstances.

There is no conflict among the appellate courts with regard to this issue, nor is the Fifth Circuit ruling a departure from "the accepted and usual course of judicial proceedings" so as to merit review by this Court under Rule 10 of the Rules of the Supreme Court of the United States. The Fifth Circuit ruling should be left undisturbed.

Although petitioners proffer an argument, of sorts, that the Fifth Circuit ruling conflicts with *United States v. Winstar*, *Erie Railroad Company v. Tompkins* and the Full Faith and Credit Clause, these cases and this Constitutional provision have nothing to do with this case and any "conflict" is illusory. Furthermore, petitioners raised no argument relating to *Erie* or the Full Faith and Credit Clause in the

lower courts. This Court should also decline to review this argument, and leave the Fifth Circuit ruling undisturbed.

The petitioners are actually arguing that the district court and the Fifth Circuit incorrectly ascertained the Louisiana law to use as guidance and assistance in defining the applicable federal common law. Although the lower courts were not *bound* by Louisiana law, since they were applying federal common law, in fact they properly identified and applied Louisiana law. This argument does not merit review by this Court, and the Fifth Circuit ruling should not be disturbed.

Respectfully submitted,

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